

IN THE 30th JUDICIAL DISTRICT
CIRCUIT COURT OF POLK, MISSOURI

FILED
9 O'CLOCK 25 MINUTES - M

STATE OF MISSOURI ex rel. JEREMIAH
W. (JAY) NIXON, Missouri Attorney General,

Plaintiff,

v.

HOLT CONSTRUCTION AND ROCK, LP
a Missouri Limited Partnership,

Defendant.

Case No. OSPO-CC00035

Shiner
Circuit Clerk & Ex-Officio Recorder

CONSENT JUDGMENT

WHEREAS, Plaintiff, the State of Missouri, ex rel. Jeremiah W (Jay) Nixon, Missouri Attorney General ("Missouri"), filed a Petition for Injunctive Relief against Holt Construction and Rock, LP ("Holt Construction") alleging Holt Construction caused pollution to be released into the Pomme de Terre River and that Holt Construction created and maintained a public nuisance on the Pomme de Terre River;

WHEREAS, Holt Construction is a company engaged in the business of mining sand and gravel within the State of Missouri. The Missouri Department of Natural Resources, Land Reclamation Program issued Holt Construction a permit to mine sand and gravel on an exposed gravel bar near the Pomme de Terre river at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri;

WHEREAS, to facilitate access to its' mining operations, Holt Construction constructed a bridge across the Pomme de Terre River in Polk County, Missouri at Sections 12 and 13, Township 32 North, Range 22 West. The bridge was built by placing three concrete culverts in the Pomme de Terre river and pouring approximately sixty (60) dump truck loads of material on

top of the culverts. The fill material created an elevated roadway by which Holt Construction used to cross the river to facilitate mining of sand and gravel from a nearby sandbar;

WHEREAS, Missouri contends (a) the bridge created by Holt Construction was improperly sized and constructed of material that was inadequate to withstand erosion by the river's current, (b) the culverts used were inadequate for the river to pass under the bridge without the water speed increasing as it passed through the culverts (which have been removed) which caused the river to back up on the upstream side of the bridge, and (c) woody debris from the river lodged in the culverts thereby preventing and/or limiting the free movement of fish in the river;

WHEREAS, Missouri contends that the materials used to build the bridge are considered pollution as defined by §§ 644.016(23), & 644.016(16), RSMo. Thus, by putting concrete culverts and other material, into the Pomme de Terre River to construct the bridge, Missouri contends that Holt Construction polluted the waters of the State of Missouri;

WHEREAS, Missouri contends that the alleged pollution of the Pomme de Terre River amount to a public nuisance by affecting the public right to keep waters of the state free of pollution and to allow the free movement of fish on the River which destroying the purity of the water, aesthetics and recreational use of the River enjoyed by citizens of Missouri to which every citizen is entitled;

WHEREAS, Holt Construction denies the allegations and contentions of Missouri;

WHEREAS, Missouri and Holt Construction agree that settlement of this action is in the best interest of the parties and in the public interest, and that entry of this Consent Judgment without further litigation is the most appropriate means of resolving this matter;

WHEREAS, Missouri and Holt Construction consent to entry of this Consent Judgment without trial of any issues;

NOW, THEREFORE, it is hereby ORDERED ON CONSENT, ADJUDGED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. The Petition states a claim upon which relief can be granted against Holt Construction for creating and maintaining a public nuisance by discharging contaminants into the Pomme de Terre River thereby causing pollution of the River and for violation of the Fish and Game statutes found at § 252.200, RSMo;

2. The Court has jurisdiction over this matter pursuant to §§ 478.070 and 478.220, RSMo;

3. Venue is proper in this Court and the Attorney General has the right to bring this civil action pursuant to §§ 508.040 and 27.060 RSMo.

II. APPLICABILITY

4. The provisions of this Consent Judgment apply to and are binding upon Missouri and Holt Construction's officers, employees, agents, successors and assigns;

5. Notwithstanding any retention of contractors, subcontractors or agents to perform any work required under this Consent Judgment, Holt Construction shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Judgment. In any action to enforce this Consent Judgment, Holt Construction shall not assert as a defense the failure of its employees, servants, agents or contractors to take actions necessary to comply with this Consent Judgment;

6. Jeremiah W. (Jay) Nixon is the duly elected, qualified and acting Attorney General for the State of Missouri who is qualified by § 444.788, RSMo to bring this action on behalf of the State of Missouri;

7. Holt Construction is a limited partnership in good standing that was created and organized under Missouri law and registered to do business in Missouri.

III. APPLICABLE LAW

8. A water contaminant is defined by statute to include, “any particulate matter or solid matter . . . which is in or enters any waters of the state either directly or indirectly.” § 644.016(23);

9. Waters of the state is defined by statute to include, “all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned, leased or otherwise controlled by a single person or by two or more persons” § 644.016(26).

10. As stated in § 644.016(16), pollution is defined to include:
such contamination or other alteration of the physical, chemical or biological properties or any waters of the state, including change in temperature, taste, color turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid radioactive, or other substance into any waters of the state as will or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life;

11. Sediment, soil and rock are particulate matter included in the definition of “water contaminant” as defined in § 644.016(23), RSMo, and thus sediment, soil and rock are “pollution” as defined by § 644.016(16), RSMo;

12. Pursuant to § 252.200, RSMo, it is unlawful for any person to:

Place or cause to be placed or erected any seine, screen, net, weir, fish dam or other obstruction in or across any of the waters, rivers, creeks, ponds, streams, sloughs or other watercourse within the jurisdiction of this state in such a manner as will obstruct the free passage of fish up and down and through such water or watercourses;

13. The State of Missouri is the owner of all wildlife within the state. § 252.030, RSMo;

14. The Attorney General of Missouri has the authority to pursue common law nuisance claims to seek abatement and penalties for the pollution of waters of the State of Missouri. § 27.060, RSMo; § 644.131, RSMo; *State of Missouri ex rel. Dresser Industries, Inc., v. Ruddy*, 592 S.W.2d 789, 792 (Mo. 1980) (en banc); and *State ex rel. Wear v. Springfield Gas & Electric Co.*, 204 S.W. 942 (Mo App. Ct. 1918);

15. A public nuisance is an, “unreasonable interference with a right common to the general public.” *Ruddy*, 592 S.W.2d at 792. Missouri citizens share a common objective of keeping Missouri waterways free of contaminants. *Id.* Missouri citizens also have a right to protect aesthetic values of its natural resources. *Id.* at 793. Moreover, Missouri has a right to protect the fish it owns within the Pomme de Terre River. § 252.030, RSMo. Thus, conduct

causing contamination to waters of the state has long been recognized as a public nuisance.

Ruddy, 592 S.W.2d at 792;

16. It is the duty and responsibility of the Attorney General to protect the general public from pollution. *Id.*; § 27.060, RSMo;

17. The Missouri Clean Water codifies and defines what constitutes a public nuisance. *Ruddy*, 592 S.W.2d at 793-94. However, the Missouri Clean Water Law does not preempt the Missouri Attorney General's authority to bring suit for a public nuisance. § 644.131, RSMo; *and Ruddy*, 592 S.W.2d at 793-94.

IV. STIPULATIONS OF FACT

18. On November 9, 2004, the Land Reclamation Commission issued Holt Construction a permit which authorized the mining of sand and gravel on the Pomme de Terre River at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri. Exhibit 1. The mine site is southeast of Bolivar, Missouri and approximately 5 miles north of Pleasant Hope, Missouri, near highway KK on the Pomme de Terre River. Exhibits 2 and 3;

19. To facilitate Holt Construction's mining operation, Holt Construction constructed the bridge across the Pomme de Terre River in Polk County, Missouri at Sections 12 and 13 Township 32 North, Range 22 West in Polk County, Missouri. Holt Construction built the bridge by placing concrete culverts in the River and pouring approximately sixty (60) dump truck loads of material on top of the culverts in the Pomme de Terre River to create a roadway to cross the River to facilitate mining of sand and gravel from a sandbar. Exhibits 4 and 5;

21. Holt Construction then used the bridge to access the sandbar located at Sections 12 and 13 Township 32 North, Range 22 West in Polk County, Missouri from property owned by Mr. Holt on the outside bend of the River, as seen in Exhibits 3 & 6. Missouri contends Holt Construction's mining activities on the sandbar also resulted in the destruction of vegetation and the alteration of the sandbar. *Compare* Exhibit 8 (pre-mining) with Exhibit 6 (post-mining);

23. The Pomme de Terre River is a navigable stream that carries waters of the State of Missouri. Fish owned by the State of Missouri live in the waters of the Pomme de Terre River. The Pomme de Terre River is used by citizens of the State of Missouri for agriculture, wildlife habitat, recreation and domestic water supply;

24. Missouri filed a Petition on June 13, 2005 alleging that Holt Construction created and maintained a public nuisance in and upon the waters of the State of Missouri by placing culverts, and other material into the Pomme de Terre River.

V. STIPULATED PENALTIES

25. In consideration of forbearance for not fully litigating Missouri's allegations and for the consideration of terminating this matter without conclusively determining the factual basis for Missouri's allegations, Holt Construction agrees to pay \$802.49 to the State of Missouri immediately upon signing this Consent Judgment and to pay an additional \$10,000 in the event Holt Construction fails to fulfill and/or comply with each and every term of this Consent Judgment. The \$802.49 payment shall be made by certified or cashier's check made payable to the "*State of Missouri (Department of Conservation)*" and mailed along with the Consent

Judgment to: "JoAnn Horvath, Collections Specialist, Missouri Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102-0899;"

26. Should Holt Construction fail to comply with the terms of this Consent Judgment, the \$10,000.00 suspended penalty shall become due immediately and Holt Construction shall pay said suspended penalty (made payable to the "*State of Missouri ('Polk County Treasurer as Custodian for the Polk County School Fund')*") within five (5) days following a determination by this Court that Holt Construction has failed to fulfill and/or comply with each and every term of this Consent Judgment;

27. On or before June 13, 2005, Holt Construction shall commence work toward compliance with the remediation plan on the Pomme de Terre River at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri as set forth in Exhibit 9. Holt Construction shall remediate the affected stream bank, as described in the Exhibit 9 by June 20, 2005. Holt Construction shall complete the remainder of the remediation plan on or before July 13, 2005. The parties recognize that implementing the remediation plan may require crossing of the Pomme de Terre River to remove excess topsoil, sand and gravel as contemplated in the plan. Therefore, the parties recognize that crossing the river for the sole and express purpose of compliance with the remediation plan shall be allowed without liability to Holt Construction;

28. On May 17, 2005, Holt Construction submitted an Open Pit Mining Application to Missouri Department of Natural Resources, Land Reclamation Program. Holt Construction shall formally withdraw the May 17, 2005 Open Pit Mining Application on or before June 24,

2005. Holt Construction shall not to apply for an Open Pit Mine Operation Permit for the above location;

29. Holt Construction shall not mine sand and gravel at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri if accessing the exposed gravel bars requires crossing or entering the water of the Pomme de Terre River without the use of a low water crossing approved by the Missouri Department of Conservation. Holt Construction shall not construct any bridge or river crossing upon the Pomme de Terre River with the exception of a low-water river crossing that complies with design specifications established and/or approved by the Missouri Department of Conservation. Missouri agrees to make a design available for the subject site immediately following the entry of this Consent Judgment so that Holt Construction may continue mining sand and gravel as allowed by their permit. Missouri is under no obligation to reimburse or compensate Holt Construction for any cost or lost profits associated with the construction, design, or the inability to construct a low-water crossing, for whatever reason, on the Pomme de Terre River;

30. While engaged in the operation of sand and gravel mining, Holt Construction shall maintain a 10 foot buffer zone on the Pomme de Terre River at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri. No land disturbance or mining of sand and/or gravel shall take place within the 10 foot buffer zone as set forth above;

31. Holt Construction shall provide reasonable access to the property located at Sections 12 and 13, Township 32 North, Range 22 West in Polk County, Missouri for all representatives of the of the State of Missouri to conduct inspections of the mine site to evaluate

whether Holt Construction is complying with the terms of this Consent Judgment;

32. No amount of stipulated penalties paid by Holt Construction shall be used to reduce its federal or state tax obligations;

33. Upon compliance with the terms and conditions of this agreement, Missouri agrees not to bring or cause to be brought any other criminal or civil action against Holt Construction for the specific facts set forth above which forms the basis for above-captioned lawsuit. However, nothing in this agreement shall be interpreted to prevent Missouri from seeking enforcement of the provisions of this Consent Judgment;

34. Moreover, nothing in this Consent Judgment shall be construed as excusing or forgiving future noncompliance with any of the Missouri environmental laws or requiring the Attorney General to forego pursuit by any legal means of any future noncompliance by Holt Construction with any of these environmental laws or the rules and regulations promulgated thereunder;

35. Upon entry of this Consent Judgment, this Consent Judgment shall constitute an enforceable judgment for purposes of post-judgment collection in accordance with Missouri Rules of Civil Procedure and other applicable authority. Missouri shall be deemed a judgment creditor for purposes of collection of any unpaid amounts of the stipulated penalties and interest. Should Holt Construction fail to comply with the terms of this Consent Judgment, Missouri may elect to proceed with an action for collection of the stipulated penalties or bring an action for contempt in lieu of seeking stipulated penalties for violations of this Consent Judgment.

VI. General Provisions

36. Each party to this action shall bear its own costs and attorneys' fees;

37. All information and documents submitted by the Defendant to the State of Missouri pursuant to this Consent Judgment shall be subject to public inspection, unless subject to legal privileges or protection or identified and supported by the Missouri Sunshine Law;

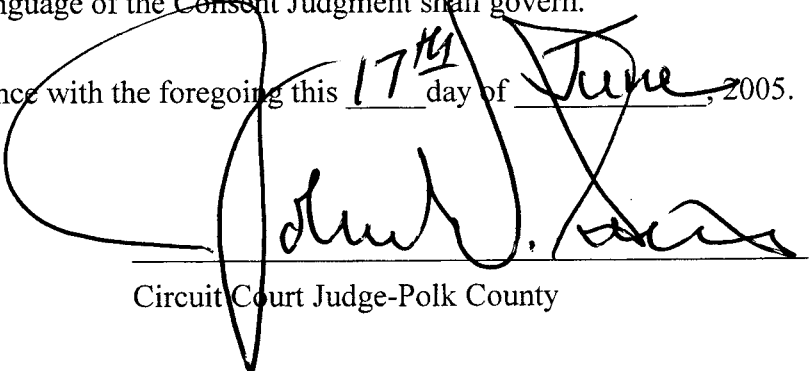
38. By signing this Consent Judgment, all signatories warrant that they have read and understood the terms of this Consent Judgment, and that they have the authority to sign this Agreement on behalf of their respective party;

39. The terms stated hereinabove constitute the entire and exclusive agreement of the parties hereto. There are no other obligations of the parties, be they expressed or implied, oral or written, except those which are expressly set forth hereinabove. The terms of this agreement supercede all previous memoranda of understanding, notes, conversations, and agreements expressed or implied. This agreement may not be modified orally;

40. The Court retains jurisdiction of this case after entry of this Consent Judgment to enforce compliance with the terms and conditions of this Consent Judgment and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Consent Judgment, any party may apply to the Court for any relief necessary to construe or effectuate this Consent Judgment;

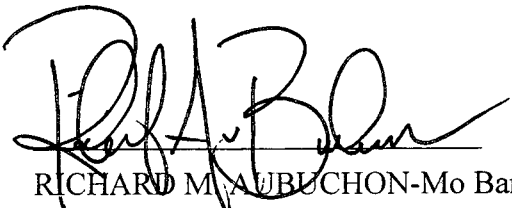
41. In the event that (i) any provision or authority of this Consent Judgment or the application of this Consent Judgment to any party or circumstance is held by any judicial or administrative authority to be invalid, or (ii) any judicial or administrative authority finds that Holt Construction has sufficient cause not to comply with one or more provisions of this Consent Judgment, then, such provisions and any other provisions conditioned thereon, shall be held invalid and all other provisions of this Consent Judgment shall remain in full force and effect, and Holt Construction's obligation to comply with all other provisions of this Consent Judgment shall not be affected thereby. In the event that any provision of the Attachments are in conflict with the Consent Judgment, the language of the Consent Judgment shall govern.

So **ORDERED** in accordance with the foregoing this 17th day of June, 2005.


Circuit Court Judge-Polk County

For Missouri:

JEREMIAH W. (JAY) NIXON
Attorney General


RICHARD M. AUBUCHON-Mo Bar # 56618
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
573.751.5334 - Telephone
573.751.8796 - Fax

DATED: JUNE 10, 2005

STATE OF MISSOURI, } ss.
COUNTY OF POLK

I, Vesta Seiner, Clerk of the Circuit Court of Polk County, Missouri do hereby certify the foregoing to be a true and correct copy of the record as appears in my office.

IN TESTIMONY WHEREOF, I
hereunto set my hand and
affix the official seal of
the Circuit Clerk this
____ day of

(SEAL)


2005

Vesta Seiner, Circuit Clerk of Polk County

For Holt Construction and Rock, LP:

Pamela Holt, G.P.

Pamela Holt-General Partner

Holt Construction and Rock, LP

1559 East 405 Road

Bolivar, MO 65613

DATED: 6/10/05